IN THE MATTER OF AN ARBITRATION UNDER THE AGREEMENT ESTABLISHING THE ASEAN-AUSTRALIA NEW ZEALAND FREE TRADE AREA

B E T W E E N:

ZEPH INVESTMENTS PTE LTD
(Co. No. 201902599N) Claimant

and

THE COMMONWEALTH OF AUSTRALIA Respondent

ANNEXURE 8C
TO THE
NOTICE OF ARBITRATION
DATED 29 MARCH 2023
(Amended 30 September 2023)

Addendum – Claimant's Submissions on Damages

Claimant's Submissions on Damages

Damages Principles to be Applied

1 In this Schedule, the Claimant addresses the standard of reparation under international law which is to be applied to Australia's violation of the fair and equitable treatment (**"FET"**) and unlawful expropriation of AANZFTA, and quantifies the compensation owed to the Claimant. The Claimant reserves the right to supplement or amend these submissions as required.

2 Regardless of whether the Tribunal finds either or both (i) unlawful expropriation by the Respondent; and (ii) violation of the FET obligations by the Respondent, the damages analysis is the same. The loss in each case is the damages that would have been awarded in the 2020 Arbitration by Mr McHugh AC KC and the additional damages caused by the destruction of the value of the contractual rights under the State Agreement and under the 2020 Arbitration Agreement. As in *Vivendi v. Argentina*, "the same state measures" amount to both an unlawful expropriation and an FET violation, "caus[ing] more or less equivalent harm" and "emasculat[ing] the Concession Agreement" such that it was rendered "valueless."[1] Similarly, the Tribunal in *Rumeli* found that the loss suffered by the Claimants was the same "…whether or not this is characterised as an expropriation calling for compensation under the BIT or merely as the consequence of some other internationally wrongful act, such as a breach of the obligation of fair and equitable treatment."[2] The same principle applies in the present case.

3 The AANZFTA does not specify a standard for compensation for a breach of Article 6 (Ch 11) or for unlawful expropriation under Article 9. The Claimant therefore relies on general principles of international law.

4 It is uncontroversial that damages for breach of international obligations, including obligations contained in investment treaties like the AANZFTA, are awarded based on

[1] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007 (partly annulled), para 8.2.8 – 10 (**Exh. CLA-18**) ("*Argentina v Vivendi*"). See also Sergey Ripinsky and Kevin Williams, DAMAGES IN INTERNATIONAL INVESTMENT LAW (2008) **(Exh. CLA-58)** ("*Ripinsky*"), at p.98.

[2] *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Rep. of Kazakhstan*, ICSID Case No. ARB/05/16, Award (**Exh. CLA-19**) ("*Rumeli*"), para 793.

the principles set out in the *Chorzów Factory* case[3] and in the ILC Articles on State Responsibility. These principles are considered part of customary international law.

5 In *Chorzów*, the Permanent Court of International Justice articulated the two principal requirements of the full reparation standard. First, compensation must be full – it must wipe out all the consequences of the illegal act and re-establish the situation which would have been. Second, full compensation should be restitution in kind or its monetary equivalent, supplemented, if needed, with additional damages for loss sustained that would not otherwise be covered by restitution. The Court stated:[4]

> *"[R]eparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it— such are the principles which should serve to determine the amount of compensation due for an act contrary to international law."*

6 The *Amoco v. Iran* tribunal defined "full reparation" (in accord with *Chorzów*) as follows: *"[R]estitution in kind or, if impossible, its monetary equivalent. If need be, 'damages for loss sustained which would not be covered by restitution' should also be awarded."*[5]

7 The ILC Articles on State Responsibility confirm the full reparation standard position:

(a) Article 31 of the ILC Articles ("Reparation") provides:

> *"1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.*
>
> *2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State."*

---

[3] *Factory at Chorzów (Germany v. Poland)*, Decision on Indemnity, 1928 P.C.I.J. (ser. A) No. 17, (13 September 1928) ("*Chorzów*"), at 47 (**Exh. CLA-20**).
[4] *Chorzów* at 47 (**Exh. CLA-20**).
[5] *Amoco Int'l Fin. Corp. v. Islamic Rep. of Iran*, 27 I.L.M. 1314 (14 July 1987) ("*Amoco v. Iran*"), at para 191 (**Exh. CLA-21**).

(b) Article 35 of the ILC Articles ("Restitution") adds:

> *"A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed . . .".*

(c) Article 36 of the ILC Articles ("Reparation") states:

> *"1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.*
>
> *2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established."*

8 The Articles on State Responsibility (Commentary) confirm that the full reparation formula in the Articles is derived from the *Chorzów Factory* case.[6] Investment tribunals have consistently adopted this formula when assessing damages caused by an internationally wrongful act.[7]

9 In the present case, the action which constitutes the breach is the enactment of the Amendment Act. The Claimant seeks damages to compensate for the loss and damages caused by the Amendment Act. Had the Amendment Act not been enacted, the following would have occurred:

(a) The 2020 Arbitration would have proceeded in accordance with the 2020 Arbitration Agreement (and applicable legislation to which it referred), and Mr McHugh AC KC would have delivered his award in that Arbitration by no later than 12 February 2021. By terminating the 2020 Arbitration Agreement and the 2020 Arbitration which was being conducted in accordance with its terms, the

[6] Commentary to the Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001) ("ILC Articles' Commentary"), at 91 (**Exh. CLA-10**).

[7] See, for example: *Vivendi v Argentina*, para 8.2.5 (**Exh. CLA-18**) ("There can be no doubt about the vitality of [the Chorzów Factory] statement of the damages standard under customary international law, which has been affirmed and applied by numerous international tribunals as well as the PCIJ's successor, the International Court of Justice."). See also *ADC Affiliate Ltd. v. Hungary*, ICSID Case No. ARB/03/16, Award (2 October 2006) ("*ADC v Hungary*"), para 493 (**Exh. CLA-29**); *Quiborax S.A. and Non Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award (16 September 2015) ("*Quiborax*"), para 328 (**Exh. CLA-22**); and *Saipem S.p.A. v. People's Rep. of Bangladesh*, ICSID Case No. ARB/05/7, Award (30 June 2009) ("*Sapiem*"), para 201 (**Exh. CLA-23**).

Amendment Act prevented this from occurring. The Amendment Act also prevents the Claimant's Subsidiaries from commencing a new domestic arbitration to recover their damages for breach of the State Agreement. In these circumstances, the Claimant requests that this Tribunal "step into the shoes" of Mr McHugh AC KC and order the Respondent to pay the damages that Mr McHugh AC KC would (in the Tribunal's assessment) have ordered in the 2020 Arbitration.

(b) Once the process provided for in the 2020 Arbitration Agreement had concluded and the "State Agreement" was seen to be effective (i.e., it could be enforced by the Claimant's Subsidiaries), the Claimant's Subsidiaries would likely have resumed developing the Mining Tenements under the State Agreement, as originally planned. Market confidence in Mineralogy and its co-proponents (including IM) would have been restored by the effective demonstrated enforcement of the State Agreement. The Amendment Act destroyed all commercial possibility of the Claimant through its subsidiaries undertaking further projects pursuant to the State Agreement, as a result of the extreme sovereign risk created by the Amendment Act. The Claimant therefore seeks compensation for its inability to develop the Mining Tenements now that the State Agreement has been shown to be unenforceable and effectively "worthless".

10 The fact of these losses and their quantum are demonstrated below, as are consequential claims based on taxation treatment and interest.

Value of the Iron Ore Market

11 As set out in this schedule, the Claimant has suffered billions of dollars in loss and damage resulting from its inability to develop its Mining Tenements as a result of the Amendment Act. While the figures discussed below are large, when viewed in the context of Australia's overall iron ore market, they are clearly reasonable and represent real loss suffered by the Claimant.

12 As discussed below the BSIOP is valued at US$7.768 billion (using a discounted cashflow analysis). The project would have provided the ability to mine around 2 billion tonnes of ore across the life of the mine (producing 24 mtpa of iron ore magnetite once both phases were in production).

13 In the year 2022-23, Australia is expected to export around 900 million tonnes of iron ore, with an expected value of A$113 billion.[8] The vast majority of this iron ore is exported by Rio Tinto and BHP.

14 As can be seen from these statistics, when placed in context, the values claimed in this arbitration are more than reasonable and, indeed, are relatively small in the context of Australia's overall iron ore market.

15 Moreover, most of Mineralogy's ore would have been exported to China. In 2022 Western Australia exported 692 million tonnes of iron ore to China alone.[9] If Mineralogy had developed the claimed additional 20 projects over the 50 year remaining life of the State Agreement following the Barnett rejection those projects would have amounted to a total of 480 million tonnes of capacity far less than the exports to China in 2022.

Loss suffered as a result of being unable to pursue the 2020 Arbitration

16 The Amendment Act prevented Mr McHugh AC KC from delivering his award on damages in the 2020 Arbitration in accordance with the 2020 Arbitration Agreement.

17 The Amendment Act terminated the 2020 Arbitration and the 2020 Arbitration Agreement and ensured that the arbitral process envisaged by that agreement could never be completed. Had the 2020 Arbitration Agreement not been terminated, and if Mr McHugh AC KC had been able to hear the arbitral dispute in November/December 2020, Mr McHugh AC KC would have issued an award by 12 February 2021, quantifying the loss and damage to which the Claimant's subsidiaries were entitled for Western Australia's breach of the State Agreement (noting that Western Australia's liability and the Claimant's Subsidiaries' entitlement to recover damages had already been established by previous arbitral awards, which the Amendment Act also extinguished). The draconian provisions of the Amendment Act also ensured that no new arbitration could be commenced by the Claimant's Subsidiaries to pursue their rights and remedies. In short, the primary purpose of the Amendment Act was to deprive the Claimant and its subsidiaries of the damages that would have been awarded to the Claimant's Subsidiaries in accordance with the terms of the 2020 Arbitration Agreement and/or the 2020

---

[8] SteelOrbis, "Australia cuts iron ore export earnings forecast for FY 2022-23 amid lower price expectations", 20 December 2022 (**Exh. C-467**).

[9] Wood Mackenzie, Iron Ore Report, March 2023 (**Exh. C-459**).

Arbitration for losses incurred as a result of Western Australia's already established breach of the State Agreement.

18 The 2020 Arbitration Agreement cannot be resurrected, and the 2020 Arbitration cannot now be re-established. They were terminated by an Act of Parliament that is still in place and which has survived domestic law challenges before Australia's highest court. An investment tribunal does not have the power to repeal domestic legislation or declare it invalid. Applying the principles of international law set out above, the Claimant is entitled to compensation that provides proper redress for the consequences of the Amendment Act, which wrongfully terminated the 2020 Arbitration Agreement and brought an abrupt end to the 2020 Arbitration which was being conducted under its auspices and /or the State Agreement.

19 It is trite law that a claimant bears the burden of proving the loss it claims. There are two elements to proving loss: (i) the fact of loss; and (ii) the quantum of loss.[10] A claimant must satisfy its burden to show that, on the balance of probabilities, a loss has been suffered as a result of the wrongful act. This is, in essence, the requirement to prove causation.[11]

20 In relation to the quantum of the loss, the tribunal in *Lemire v Ukraine* stated:[12]

> "Once causation has been established, and it has been proven that the *in bonis* party has indeed suffered a loss, less certainty is required in proof of the actual amount of damages; for this latter determination Claimant only needs to provide a basis upon which the Tribunal can, with reasonable confidence, estimate the extent of the loss."

[10] *Bilcon of Delaware v Canada*, PCA Case No. 2009-04, Award on Damages, 10 January 2019 ("*Bilcon*"), para 112 (**Exh. CLA-24**).
[11] *Bilcon*, para 110 (**Exh. CLA-24**).
[12] *Joseph Charles Lemire v Ukraine*, ICSID Case No. ARB/06/18, Award, 28 March 2011 ("*Lemire v Ukraine*"), para 246 (**Exh. CLA-25**).

21 As the tribunal in *Khan Resources v Mongolia* said, estimating future losses will often involve some level of uncertainty or estimation, but should not be purely speculative.[13] Rather than certainty as to the quantum of the loss, a tribunal requires the following: [14]

> "[w]hat is required is not the selection of an arbitrary figure but the application of principles which at least enable the reader of the judgment to discern the factors which led the Court to fix the sum awarded. Moreover, those principles must be capable of being applied in a consistent and coherent manner, so that the amount awarded can be regarded as just, not merely by reference to the facts of this case, but by comparison with other cases."

(a) The Fact of Loss – 2020 Arbitration

22 The 2020 Arbitration was very well progressed when the 2020 Arbitration Agreement and the 2020 Arbitration were abruptly terminated by the Amendment Act. Evidence and other material submissions had been filed by the Subsidiaries in accordance with Mr McHugh's directions. Mr McHugh AC KC had issued further directions in June 2020 setting a hearing date and committing to delivering his award by 12 February 2021.[15] Liability had already been established by the First Award and the primary issue before Mr McHugh AC KC in the 2020 Arbitration was the quantum of the damages suffered by the Claimant's Subsidiaries as a result of the failure of the Minister to act in accordance with Clause 7 of the State Agreement.

23 Accordingly, the only remaining issue was quantum. At the time the 2020 Arbitration Agreement was terminated by the Amendment Act, the Claimant's Subsidiaries had provided Mr McHugh AC KC with very substantial evidence as to their loss – both in relation to causation and quantum. Western Australia had proffered no defence or substantive rebuttal of the claims and no evidence of any kind.

24 Based on the evidence available, there is a high degree of certainty that:

(a) Mr McHugh AC KC would have issued an award in or around February 2021;

---

[13] *Khan Resources Inc. v Mongolia*, UNCITRAL, Award on the Merits, 2 March 2015 ("*Khan Resources*"), para 410(a) (**Exh**. **CLA-26**).
[14] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of Congo),* Compensation, Judgment, ICJ Reports 2012 ("*Diallo*"), p. 393, Declaration of Judge Greenwood appended to Compensation Judgment, 19 June 2012, para 7 (**Exh**. **CLA-27A**).
[15] Directions of McHugh AC KC, 26 June 2020 (**Exh. C-384**).

(b) That award would have addressed the damages claimed by the Claimant's Subsidiaries; and

(c) Mr McHugh AC KC would have awarded substantial damages for the loss suffered by the Claimant's Subsidiaries. Indeed, this is the very reason provided by Mr McGowan and Mr Quigley for enacting the Amendment Act. During the Parliamentary debate on the Act, the Government confirmed that it had received advice from a senior silk, Mr Higgs SC, that Western Australia faced a "*real and substantial risk*" that it would be found liable to pay damages to the Claimant's Subsidiaries, up to A$30 billion.[16] This is unsurprising, given that Western Australia had itself proffered expert evidence in previous litigation proceedings that the value of the BSIOP was A$27 billion.[17] Given the significant risk, which Mr McGowan at the time described as a "huge risk", Western Australia chose not to mount any defence in the 2020 Arbitration, but instead to terminate the 2020 Arbitration (and the 2020 Arbitration Agreement) to avoid its damages liability. The Respondent itself has since acknowledged the likelihood of damages by including in its Mid-Year Economic and Fiscal Outlook for 2020-2021 an acceptance that the Claimant's protections should be included in a "Statement of Risk".[18]

25 It is submitted that the facts establish causation – but for the Amendment Act, Mr McHugh AC KC would have delivered his award in the 2020 Arbitration. That award would likely have found Western Australia liable for substantial damages for breach of the State Agreement. The Claimant has lost the benefit of that award because of the Amendment Act and is entitled to damages for that loss.

26 In the alternative, should the Tribunal determine the above analysis does not sufficiently establish the fact of loss, the Claimant submits that the Tribunal should determine damages based on "loss of chance" (see **Annexure 7C** to the Notice of Arbitration).

(b) The Quantum of Loss – 2020 Arbitration

27 It is submitted that the fact of loss has been established with sufficient certainty and the primary issue for this Tribunal to determine is the quantum of that loss.

---

[16] Legislative Assembly Hansard, 12-13 August 2020, p.4831 (**Exh. C-429**).
[17] Preston Affidavit, 12 July 2013 (**Exh. C-410**).
[18] See Letter re denial of benefits, 21 January 2021, (**Exh. C-154**).

28 As set out above, assessing the quantum of loss often involves some form of estimation by the Tribunal, and certainty is not required.

29 While the Tribunal cannot know with certainty what sum Mr McHugh AC KC would have awarded by way of damages in the 2020 Arbitration, it is submitted that the Tribunal has before it sufficient information to determine the quantum of damages that Mr McHugh AC KC would likely have awarded based on the evidence, law and facts presented to him. The information provided to the Tribunal to assist in making this assessment includes:

(a) the First and Second Awards;

(b) the witness statements and expert reports filed by the Claimant's Subsidiaries in the 2020 Arbitration;

(c) the Claimant's Subsidiaries' Amended Statement of Issues, Facts and Contentions

(d) submissions which would have been made in the 2020 Arbitration if not for the Amendment Act (as amended);

(e) the available evidence of Western Australia's assessment of damages (including an affidavit as to the value of the BSIOP by Western Australia's expert, William Preston);

(f) the evidence of [redacted] regarding amended claims that the Claimant's Subsidiaries intended to submit;

(g) submissions on the applicable Australian law that would have been applied by Mr McHugh AC KC;[19]

(h) the witness Statement of [redacted] dated 14 February 2023; and

(i) the Witness statement of [redacted] dated 13 February 2023.

30 The above evidence supports the Claimant's Subsidiaries' claims for the following loss:

---

[19] See Draft Opening Submissions (**Exh. C-169**). As Australian law governed the 2020 Arbitration, Mr McHugh AC KC would have applied that law when assessing the quantum of damages suffered by the claimants.

(a) the value of the BSIOP to IM as of 8 October 2012 (being the date by which the Minister, acting lawfully and reasonably, should have approved the BSIOP Proposal) in the amount of US$7,768,000,000;

(b) Mineralogy's lost royalty due under the BSIOP. The value of that royalty, over the full life of the BSIOP, was US$233,700,000 as of 8 October 2012;

(c) the loss suffered by Mineralogy as a result of CITIC Pacific's failure to settle the "First Option" under the China Project Option Agreement (**"CPOA"**).[20] The value of settling the First Option which has been lost by Mineralogy is US$8,190,000,000, comprised of:

    i a payment of the US$200,000,000 option fee which Mineralogy would have received upon completion of the "First Option"; and

    ii the amount which Mineralogy would otherwise be able to receive or monetise (by way of sale in 2012), the value of which has been assessed as US$7,990,000,000; and

(d) an additional category of loss that would have been placed before Mr McHugh AC KC in or about August 2020 had the Amendment Act not intervened. This is the loss of the projects that would have proceeded between 2012 and 2022, but for the Amendment Act. The Claimant's Subsidiaries would have claimed loss of US$31,072,000,000 for these projects.

31 It is submitted that, based on the evidence, the Claimant's Subsidiaries have proved their loss and Mr McHugh AC KC would likely have awarded the amounts claimed in the 2020 Arbitration for the reasons set out below.

(i) The Value of the BSIOP

32 In the 2020 Arbitration, the Claimant's Subsidiaries claimed the value of the BSIOP which could not proceed as a result of the Minister's failure to deal with the Proposal in accordance with clause 7 of the State Agreement.

33 It is recalled that the entire value of IM was based on the BSIOP, which was its only project and its only asset. Effectively that asset lost all its value following the Barnett decision of October 2012 because the arrangements in place to develop that project all

[20] China Project Option Agreement (**Exh. C-147**). The CPOA is discussed further below.

failed once the Claimant's Subsidiaries had lost the support of the State. IM's only remaining value was the contractual rights IM had under the 2020 Arbitration Agreement.

34 The evidence of [redacted] of Jefferies Investment Bank in January 2020 was that he was shocked by the Minister's refusal to recognise the BSIOP Proposal under the State Agreement, which led him to conclude that the Western Australian Government would not support the BSIOP. Without Government support, he considered the commercial value of the BSIOP to be "effectively destroyed",[21] and that it was not financeable or saleable from that time.[22] On this basis, Jefferies Bank – which had been engaged to arrange the bond issue to fund the BSIOP – decided to "cut their losses" and have nothing further to do with the Claimant's Subsidiaries due to unacceptable levels of reputational risk.[23] [redacted] considered it unlikely that Jefferies would ever deal with Mineralogy again.[24] This position was confirmed by the investigations of [redacted] who tested the market by proposing an attractive opportunity to several investment banks in 2020 – all of them declined to work with Mineralogy.[25]

35 Consequently, by August 2020, the BSIOP had no commercial value. All value in IM lay in its contractual rights under the 2020 Arbitration Agreement. The Amendment Act terminated both the 2020 Arbitration Agreement and the 2020 Arbitration itself, as well as destroyed the contractual rights of IM.

36 The evidence establishes that – before 8 October 2012 – the BSIOP was ready to be developed once it had been approved by the Minister in accordance with clause 7 of the State Agreement.[26] Arrangements for financing were simply awaiting the State's approval in order to be finalised. Contractors had been secured to undertake the development and an offtake agreement was already in place.[27] As [redacted] opined, the project had been significantly de-risked by the involvement of Metallurgical

---

[21] [redacted] Affidavit (2020 Arbitration), para 63 (**Exh. C-176**).
[22] [redacted] Affidavit (2020 Arbitration), para 66 (**Exh. C-176**).
[23] [redacted] Affidavit (2020 Arbitration), para 65 (**Exh. C-176**).
[24] [redacted] Affidavit (2020 Arbitration), para 65 (**Exh. C-176**).
[25] [redacted] Declaration, June 2020 (**Exh. C-146**).
[26] See Statement of Facts and Issues, May 2020, para 88-117E (**Exh. C-170**); [redacted] Statement (2020 Arbitration), para 50-59 (**Exh. C-176**).
[27] [redacted] Affidavit (2020 Arbitration) (**Exh. C-174**).

Corporation of China Ltd ("**MCC**") – a large and reputable EPC Contractor and Chinese State-owned enterprise.[28]

37 After the Minister refused to consider the BSIOP Proposal, however, Jefferies withdrew its support for the Project.[29] Even eight years later, the sovereign risk was inter alia such that banks and financiers were still unwilling to work with the Claimant's Subsidiaries.[30] The BSIOP had become unbankable as a result of the huge risk associated with it and the "embarrassment" that had been caused by the Minister's refusal to approve the BSIOP Proposal.[31] As explained in the submissions that would have been made to Mr McHugh AC KC, a properly functioning State Agreement was crucial to the ability of the Claimant's subsidiaries to develop the BSIOP and similar – without it, the BSIOP was destroyed, as the State was well aware.[32] As stated in years paragraph 82P of the Statement of Facts and Issues in the 2020 Arbitration:[33]

> "The immediate, proximate consequence of the Minister's breach of the State Agreement – and, collaterally, his defiance of the Court of Appeal's ruling as to the limits of the Minister's powers under the State Agreement – was to demonstrate to the Project Proponents' funders and contractual counterparties that the BSIOP did not have the support of the State, to such an extent that the State was unwilling to abide by its contractual obligations in the State Agreement. The result was immediate and permanent damage suffered to, and/or a permanent reduction in the value of, the BSIOP, including the underlying assets of the mining rights and all information comprising the feasibility study as detailed in the BSIOP Proposal, because it demonstrated to the financial markets for funding of the BSIOP (or any future project which might have been developed under the terms of the State Agreement) unacceptable financial risk which meant that such funding was not possible to achieve: the investment bank managing the proposed bond

---

28 [redacted] Affidavit (2020 Arbitration), paras 17-18 (**Exh. C-190**).
29 [redacted] Affidavit (2020 Arbitration), para 65-67 (**Exh. C-176**).
30 [redacted] Affidavit (2020 Arbitration), para 10 (**Exh. C-183**).
31 [redacted] Affidavit (2020 Arbitration), para 65 (**Exh. C-176**).
32 This is described further in the submissions that were and would have been made to Mr McHugh AC KC in the 2020 Arbitration – see, in particular, the Amended Statement of Facts and Issues, May 2020, paras 82-82A, (**Exh. C-170**).
33 Statement of Facts and Issues, May 2020, (**Exh. C-170**).

issue, and the Chinese bank proposing export credit funding, effectively walked away from the Project … No reputable investment bank, or other financier, could risk funding or financing the BSIOP (or any future project which relied on the terms of the State Agreement or the support of the State) once it had become apparent that the State's promises and contractual and legal obligations in the State Agreement could not be relied upon."

38 It is submitted that, based on the evidence before him, Mr McHugh AC KC would have confirmed that the Minister's decision of 8 October 2012 effectively destroyed the prospect of developing the BSIOP and, consequently, that the Claimant's Subsidiaries were entitled to be compensated for the value they had lost as a result of being unable to develop the BSIOP.

DCF Valuation by King

39 To determine the value of the BSIOP, provided an expert report in the 2020 Arbitration. He undertook a discounted cashflow ("**DCF**") analysis to calculate the Net Present Value ("**NPV**") of the BSIOP.[34] filed five Statements in the 2020 Arbitration between January and May 2020.

40 is an economic and financial consultant specialising in industrial metals and raw metals, with over 50 years' experience in the industry. He had initially been engaged by the Claimant's subsidiaries to carry out a financial analysis of the BSIOP in January 2012 – that analysis was included in the Bankable Feasibility Study and was verified by at the time.[35] Other than undertaking this work as an independent expert in early 2012, was (and remains) entirely independent of the Claimant's Subsidiaries.

41 In his Second Statement dated 30 January 2020, updated his January 2012 Report using a DCF analysis. He further updated and revised this report in his Statement dated 25 May 2020, due to new information available to him at that time.

42 noted:[36]

---

[34] Statement, 30 January 2020 (**Exh. C-186**).
[35] Statement, 29 January 2020, para 5, (**Exh. C-185**).
[36] Statement, 30 January 2020, p.170 (**Exh. C-186**).

> "BSIOP is adjacent to the iron ore mining project of Sino Iron, being developed by CITIC Pacific. The orebody, mining and processing methods of BSIOP would be similar, if not identical, to those of Sino Iron. BSIOP can therefore be considered as a "brownfield" project and almost as an extension of the Sino Iron project."

43 In his analysis, [redacted] determined future revenue based on sales volumes multiplied by the free on-board price of products (pricing in October 2012 was confirmed using monthly reporting, adjusted for short term abnormalities). He opined that:[37]

> "Documents from International Minerals indicate that by October 2012 contractual commitments would have existed for the sale of the product to customers in China at prices that would reflect the published spot market price for the relevant product. The calculations above show my assessment that the market price for the relevant product was US$ 153.38 per dry tonne FOB Cape Preston. I therefore conclude that on 8 October 2012 the appropriate selling price for the project's product should be US$ 153.38 per dry tonne FOB Cape Preston. That price would apply to the year 2012."

44 [redacted] applied a discount rate of 8% and concluded that the NPV of the Project as of 8 October 2012 (the day the Minister refused to deal with the Proposal in accordance with clause 7) was <u>US$7.768 billion</u>.[38] [redacted] analysis takes account of the royalty that would have been payable from IM to Mineralogy, with an NPV of $233.7 million.[39]

45 [redacted] analysis is consistent with the limited relevant evidence adduced and submitted by Western Australia. While Western Australia did not provide any evidence in the 2020 Arbitration as to its assessment of the NPV of the BSIOP, it had provided an affidavit by Mr William Preston dated 12 July 2013 in litigation proceedings before the Supreme Court of Western Australia.[40] In that affidavit, Mr Preston calculated the total EBITDA[41] of the BSIOP, he concluded that the EBITDA was A$27 billion.[42]

---

[37] [redacted] Statement, p.22 (**Exh. C-188**).
[38] As corrected by [redacted] in his [redacted] Report – [redacted] Statement, para 6 (**Exh. C-188**).
[39] [redacted] Statement, para 7 (**Exh. C-188**).
[40] Preston Affidavit, 12 July 2013 (**Exh. C-410**) filed in *Mineralogy Pty Ltd and International Minerals Pty Ltd v The State of Western Australia*, Supreme Court of Western Australia, ARB No. 3 of 2013 (**Exh**. **CLA-31**).
[41] EBITDA = Earnings Before Interest, Taxes, Depreciation and Amortisation.
[42] Preston Affidavit, paras 28(b) and 40 (**Exh. C-410**).

46 [redacted] undertook a DCF analysis using the calculations and assumptions advanced by Mr Preston on behalf of Western Australia.[43] Applying an 8% discount rate to the Project, based on 24 million tonnes (i.e., both phases of the BSIOP), Mr Preston's calculations produced an almost identical NPV to that calculated by [redacted] – US$7.39 billion.

47 The fact that both [redacted] (for the Claimant's Subsidiaries) and Mr Preston (for Western Australia) had separately undertaken calculations that produced very similar NPVs for the BSIOP, supports the accuracy of the assumptions and inputs used by [redacted] in his analysis in the 2020 Arbitration.

48 [redacted] subsequently independently reviewed the [redacted] analysis and confirmed that, in his view, it was sound. In particular, [redacted] opined that he considered the 8% discount rate to be appropriate, given a range of factors he considered relevant, including that MCC was the EPC contractor, the advanced stage of financing, market conditions at the time and the ability to sell the BSIOP.[44] He noted that the 8% rate was "conservative" for a deal in a "AAA jurisdiction with likely backing by Chinese SOEs."[45] International bonds were being financed for around 6-8% at the time.

49 It is submitted that the DCF approach is the correct approach to take in the present circumstances and that Mr McHugh AC KC would have accepted this analysis.

50 It is noted that the DCF method is a common means by which potential purchasers value assets and entities, by identifying the present worth of future cash flows those assets and entities will generate.[46] Dozens of tribunals have relied on the DCF method of valuation; it has "been constantly used by tribunals in establishing the fair market value of assets to determine compensation of breaches of international law."[47] In the case of a mine with proven reserves, the DCF method is often considered an appropriate methodology for calculating fair market value, even if the mine is not yet in production.[48] This is particularly applicable to the present case where there is significant evidence as to well-

---

[43] [redacted] Statement, para 8, (**Exh. C-187**).
[44] [redacted] Statement (2020 Arbitration), paras 83-84 (**Exh. C-190**).
[45] [redacted] Statement (2020 Arbitration), para 94(f) (**Exh. C-190**).
[46] Ripinsky at p. 195 (**Exh. CLA-58**).
[47] *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic,* ICSID Case No. ARB/01/3, Award, 22 May 2007 ((**Exh. CLA-28**) ("*Enron*"), para 385; See also *ADC v Hungary*, para 501-502 (**Exh**. **CLA-29**); *Occidental Petroleum Corporation and Occidental Exploration and Production Company v, Ecuador*, ICSID Case No ARB/06/11, Award, 24 September 2012 (**Exh**. **CLA-30**) ("*Occidental*"), para 708.
[48] See, for example, *Occidental*, para 708 and 748 (**Exh**. **CLA-30**); *Khan Resources*, para 391 (**Exh**. **CLA-26**).

advanced financing arrangements (that were simply awaiting the Minister's approval of the Proposal) and the contracts signed with MCC HK for the development and construction of the Project.

51 In *Gold Reserve v. Venezuela*, the tribunal said that, although the claimant's mining project "was never a functioning mine and therefore did not have a history of cashflow which would lend itself to the DCF model . . . a DCF method can be reliably used in the instant case because of the commodity nature of the product and detailed mining cashflow analysis previously performed."[49] It is noted that the BSIOP was effectively a "clone" or "extension" of the Sino Iron Project, with lower capital costs due to the ability to share infrastructure already developed as part of Sino Iron.[50] These parallels make projected cashflows much more certain, given that an existing project can be used as a model.[51]

52 In short, it is submitted that [redacted] DCF analysis can confidently be relied upon as the appropriate methodology for calculating the value of the BSIOP and that Mr McHugh AC KC would have accepted his evidence.

53 On this basis, the Claimant requests that the Tribunal award it the value of the BSIOP as of 8 October 2012, being US$7.768 billion Mr McHugh AC KC would have awarded compensation for the value of the BSIOP.

(ii) Loss arising from First Option under the CPOA

54 China had a significant strategic desire to own and control its supply of iron ore, which was crucial for its steel making operations. Representatives of China's state interests had expressed this desire to Mr Palmer and their preference to work with Mineralogy towards this goal.[52] The Sino Iron and Korean Steel Projects were part of achieving this goal, as was the CPOA.[53] In 2008, the Western Australian Government was aware of this strategy, and supportive of it.[54]

---

[49] *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014 (**Exh**. **CLA-32**), para 830.
[50] [redacted] Statement (2020 Arbitration), para 47 (**Exh. C-190**).
[51] See [redacted] Statement (2020 Arbitration), (**Exh. C-186**).
[52] [redacted] Statement in 2020 Arbitration, referring to Mr Rongrong (**Exh. C-174**); see also [redacted] Statement, paras 222 and 384.
[53] For a description of the CPOA see Draft Submissions in the 2020 Arbitration, paras 255-259 (**Exh. C-169**).
[54] [redacted] Statement, para 206.

55 The close working relationship between Mineralogy and Chinese State interests is further evidenced by the seniority of the officials that were dealing with Mineralogy. [redacted] expressed surprise that (now) Chinese President Xi met with [redacted] and said that this "unquestionably" showed the relationship between the Claimant's Subsidiaries and the Chinese Government. He also noted the relationship between the Claimant's Subsidiaries and other key Chinese state-owned enterprises.[55]

56 The importance of the State Agreement, showing that Mineralogy had the support of the Government, cannot be understated. China would not have dealt with Mineralogy without the State Agreement.[56] The loss of State support resulting from the Minister's refusal to treat the BSIOP Proposal in accordance with clause 7 had a devastating impact on the First Option deal under the CPOA.

57 [redacted] explains that a former Chinese Minister told him that the political fallout within the Chinese Government following Mr Barnett's refusal to approve the BSIOP Proposal was significant. Many politicians had supported Mineralogy based on the State Agreement and were now appearing foolish. This created anger and resentment towards Mineralogy, as those who had supported Mineralogy thought they had been deceived.[57]

58 There was a marked change in the relationship between CITIC and Mineralogy from the date of the Minister's refusal to consider the BSIOP Proposal in accordance with clause 7 of the State Agreement. This was not coincidental, as [redacted] learned – but a deliberate reaction by Chinese State interests to Mineralogy's loss of support from the Western Australian Government. The "certainty" that was at the heart of the State Agreement Act had been undermined. Had the State Agreement been complied with and the BSIOP Proposal approved in accordance with clause 7, there is no known reason that the relationship between CITIC and Mineralogy would not have continued as before, and the First Option settled in accordance with CITIC Pacific's intentions as announced on the Hong Kong Stock Exchange.[58]

59 In their submissions in the 2020 Arbitration, the Claimant's Subsidiaries explain that this consequence of the Minister's decision was readily foreseeable and was directly

---

[55] [redacted] Statement (2020 Arbitration), paras 24-25 (**Exh. C-190**).
[56] [redacted] Statement, paras 145 and 206.
[57] [redacted] Statement, paras 401-402.
[58] Hong Kong Stock Exchange Notice, 13 April 2012, attached to the [redacted] Statement (2020 Arbitration) (**Exh. C-190**), page 6282.

causative of the loss. These submissions are set out in paragraphs 82-82U of the Amended Statement of Facts and Issues and are incorporated by reference into this submission.[59]

60 In short, the evidence shows that the Minister's failure to deal with the BSIOP Proposal in accordance with clause 7 of the State Agreement caused the Claimant's Subsidiaries to lose the opportunity to realise the value of their projects following the Minister's unlawful rejection in 2012. It is submitted that, as a result, Mr McHugh AC KC would have awarded the Claimant's Subsidiaries compensation for this loss in the 2020 Arbitration, had it not been terminated by the Amendment Act.

61 In his [redacted] Statement in the 2020 Arbitration (dated 20 February 2020), [redacted] opined on the value of the First Option under the CPOA. [redacted] is an independent expert with over 30 years experience as an [redacted]. He has substantial knowledge of the mining industry and specific expertise in valuing projects of this nature.

62 Based on the factual evidence, [redacted] said that the First Option project would likely have settled by December 2012 and would have been in production by early 2020 (i.e., at the time [redacted] was writing his report).[60]

63 The terms of each option exercised under the CPOA were to be substantially the same as the terms used for the Sino Iron Project, albeit that each option would be about half the size of the Sino Iron Project (recalling that the Sino Iron Project had subsumed the Korean Steel Project and was therefore twice its original size).[61]

64 Based on the Sino Iron Project terms, [redacted] calculated that had the First Option been settled, Mineralogy would have received the US$200 million option fee required to be paid under the CPOA, plus an ongoing royalty of around US$150 million per year (being approximately half of the Royalty A payment under the Sino Iron Project).[62]

---

[59] Amended Statement of Facts and Issues, May 2020, (**Exh. C-170**).
[60] [redacted] Statement (2020 Arbitration), para 57 (**Exh. C-190**).
[61] [redacted] Statement (2020 Arbitration), para 58 (**Exh. C-190**).
[62] [redacted] Statement (2020 Arbitration), para 58 (**Exh. C-190**).

65 [redacted] then applied a conservative price/earnings ratio of 53 times earnings[63] to determine the current value of the royalty lost to the Claimant. He calculated the value of the royalty to be US$7.99 billion, plus the $200 million fee. Based on these figures, [redacted] said that the value of the First Option project (which he refers to as the "Mineralogy Project") was US$8.190 billion (US$200 million option fee plus US$7.99 billion royalty).[64]

66 It is submitted that [redacted] expertise, combined with his conservative approach to the valuation, would have led Mr McHugh AC KC to accept this valuation. Western Australia's failure to proffer any evidence to refute [redacted] valuation, and its preference to resort to extreme and desperate measures like the Amendment Act rather than offer any defence, is further evidence of the accuracy of his valuation.

67 The Claimant submits that this Tribunal should award Zeph Investments the opportunity to sell its project under the first option as would have been awarded in the 2020 Arbitration, in the amount of US$8.190 billion.

(iii)Additional loss arising from sovereign risk between 2012 and 2022

68 There is a further category of loss that would have been claimed before Mr McHugh AC KC in the 2020 Arbitration, had it not been for the Amendment Act.

69 As explained by [redacted] in his witness statement,[65] the Claimant's Subsidiaries intended to apply to Mr McHugh AC KC to amend their claim to include a further claim for projects that could not be developed between 2012 and 2022, as a result of the Minister's refusal to deal with the BSIOP Proposal in accordance with Clause 7 of the Statement Agreement.

70 The impact of the Minister's decision was made clear in [redacted] Statement of 7 January 2020 where he said:[66]

> "I concluded, at the time (October 2012), the Jefferies was best to cut their losses and have nothing further to do with Mineralogy and International Minerals because the reputational risk was too great. I

---

[63] This was a discounted ratio – the average ratio of peer royalty companies at the time was 106.5 times earnings ([redacted] Statement (2020 Arbitration), paras 64-69, (**Exh. C-190**). At paragraphs 70-72, [redacted] explains the reasons for the price/earnings ratio and the conservative approach taken by him to the valuation.

[64] [redacted] Statement (2020 Arbitration), para 69 (**Exh. C-190**).

[65] [redacted] Statement, paras 415-418.

[66] [redacted] Affidavit, paras 65-67 (**Exh. C-176**).

thought at the time that it was highly embarrassing to Jefferies and the rating agencies and it was certainly my view that it was highly unlikely that they would deal again with Mineralogy or International Minerals in this or any other matter …

Based on my international experience in corporate investment and financing and my personal experiences in engaging with Chinese government-owned entities in Hong Kong and China, I was aware that a fundamental requirement of Chinese government-owned companies in respect of major investments or acquisitions outside of China is to ensure such projects or companies enjoy the support of the government in the jurisdiction within which they operate."

71 [redacted] was further tested by Mineralogy in the period between early and mid-2020.[67] [redacted] (a financial analyst with Mineralogy) sought assistance from a variety of banks in connection with a potential new listing on the New York Stock Exchange of a company that would hold the Sino Iron Project royalty. This was an attractive offering.[68] All banks approached by [redacted] refused to deal with Mineralogy, despite the attractive nature of the proposal.[69] The outcome of [redacted] investigations supported [redacted] assertions – effectively Mineralogy had become unbankable as a result of lack of State support. Without the support of financiers like Jefferies, the projects that had been set for development over the period from 2012-2022 could not proceed.

72 [redacted] evidence was also supported by views expressed by [redacted] in the 2020 Arbitration. [redacted] opined that, in his view, any projects relying on the State Agreement could be progressed or monetised following the 2012 breach of the State Agreement, as the State had demonstrated its "unwillingness to honour their legal obligations."[70] In [redacted] view, the actions of the State had undermined the market's confidence in Mineralogy and had revived the sovereign risk that the State Agreement was meant to eliminate.[71]

---

[67] [redacted] Statement, paras 411-412.
[68] [redacted] Statement, para 414.
[69] [redacted] Statement, May 2020 (**Exh. C-183);** [redacted] Declaration, June 2020 (**Exh. C-146**).
[70] [redacted] Statement (2020 Arbitration), para 86 (**Exh. C-190**).
[71] [redacted] Statement (2020 Arbitration), para 88 (**Exh. C-190**).

73 As noted above, the Western Australian Government was very well aware of the importance of certainty created by the State Agreement. The Minister's decision in 2012 to act in a manner contrary to the State Agreement had profound effects on the ability of Mineralogy to develop projects, which would have been known to him at the time. The submissions before Mr McHugh AC KC explained this in detail.[72]

74 Having collated this evidence, Mineralogy intended to seek further damages in the 2020 Arbitration for those projects that were not developed between 2012 and 2020 as a result of the Minister's refusal to deal with the BSIOP Proposal in accordance with clause 7 of the State Agreement.

75 The intention was to claim for four projects that would have been developed in this period, based on the rate of development that had occurred in the previous 10 years and the projects that had been planned for the period. As four projects had been developed or were in the process of being developed between 2022 and 2012, and thus it is reasonable to assume that another four projects would have been commenced between 2012 and 2022. Indeed, this is a conservative estimate, as the projects between 2012 and 2022 would have been "clones" of the BSIOP and therefore easier to develop.[73]

76 The ability of Mineralogy to develop these projects is further supported by the fact that in 2009 Mineralogy received environmental approval for a further three projects (in addition to the Sino Iron Project and the BSIOP). These were all seen as part of the overall Mineralogy Iron Ore project in the Cape Preston area. As explained in the Public Environmental Review: [74]

> "All stages of the Mineralogy Cape Preston Iron Ore Project including this Expansion Proposal are based on the staged mining and downstream processing of magnetite ore into concentrates and/or pellets suitable for iron smelting and processing into steel products."

77 Stage 1 of the overall Project was the Sino Iron Project (as implemented), Stage 2 was the BSIOP which had been granted environmental approval. The remaining three projects for which environmental approvals were sought in the PER were known as:

---

[72] [redacted] Statement, paras 145-146.
[73] [redacted] Statement (2020 Arbitration), para 47 (**Exh. C-190**).
[74] Public Environmental Review - Executive Summary at p.(i) (**Exh. C-143**).

(a) Extension of Sino Iron Project

(b) Mineralogy Iron Ore Project; and

(c) Austeel Steel Project.

78 The table below provides the indicative construction times for each staged project:[75]

Table S1 Summary of the project characteristics of the Expansion Proposal and other stages of the Mineralogy Cape Preston Iron Ore Project

Project Characteristic	Mineralogy Cape Preston Iron Ore Project					
	Original Proposal as implemented	***Balmoral South Proposal***	**Expansion Proposal**			
	Stage 1 - Sino Iron Project	*Stage 2 - Balmoral South Iron Ore Project*	Stage 3 - Extension of Sino Iron Project	Stage 4 - Mineralogy Iron Ore Project	Stage 5 - Austeel Steel Project	Total (Expansion Proposal)
Indicative construction timing	*Commenced*	*2010-2016*	2010-2016	2010-2016	2011-2017	2010-2017
Ore mining rate	*95 Mtpa*	*80 Mtpa*	54 Mtpa	80 Mtpa	80 Mtpa	214 Mtpa
Indicative pit depth	*220 m*	*300 m*	350 m	350 m	350 m	350 m each
Ore concentrate production	*27.6 Mtpa*	*24 Mtpa*	17.4 Mtpa	24 Mtpa	24 Mtpa	65.4 Mtpa
Pellet Production[1]	*6 Mtpa*	*14 Mtpa*	No change	14 Mtpa	14 Mtpa	28 Mtpa
Power capacity	*Up to 640 MW capacity gas fired combined cycle power station*	*600 MW installed capacity gas fired combined cycle power station*	No additional power capacity required	600 MW installed capacity gas fired combined cycle power station	600 MW installed capacity gas fired combined cycle power station	1200 MW
Conveyance to port stockyards	*Slurry pipeline*	*Conveyors or slurry pipelines*	No additional pipeline required	Conveyor or slurry pipeline	Conveyor or slurry pipeline	Conveyor or slurry pipeline
Water supply						
Construction	*Groundwater bores, mobile desalination plant*	*Groundwater bores, mobile desalination plant*	Groundwater bores, desalination plant	Groundwater bores, mobile desalination plant	Groundwater bores, mobile desalination plant	Groundwater bores, mobile desalination plant
Operation	*44 GLpa desalination plant and 4 GLpa pit dewatering*	*40 GLpa desalination plant and 4 GLpa pit dewatering*	36 GLpa desalination plant No change to pit dewatering	50 GLpa desalination plant and 1 GLpa pit dewatering	50 GLpa desalination plant and 1 GLpa pit dewatering	110 GLpa
Sewage	*Package treatment plant*	*Package treatment plant*	25% increase in capacity on Stage 1	Package treatment plant	Package treatment plant	Separate package treatment plants

79 The options available to CITIC Pacific under the CPOA had to be exercised by March 2016 and would likely have included these three projects. Mineralogy expected all four

[75] Public Environmental Review - Executive Summary at p.(ii) (**Exh. C-143**).

options to be exercised for the reasons explained by [redacted] in his Witness Statement.[76] This is also consistent with the exponential growth of China's iron ore imports over that period.

80 After the Minister's refusal to deal with the BSIOP Proposal in accordance with clause 7 of the State Agreement, stages 3-5 (and any other projects) could not be developed. The reasons for this were three-fold:

(a) The CPOA expired without any of the options being settled. The evidence establishes that Chinese State interests refused to work with Mineralogy following the Minister's 2012 decision – this was a direct result of the perceived loss of support by the State and the consequent damage to Mineralogy's reputation.

(b) CITIC Pacific aggressively pursued litigation against Mineralogy regarding the Sino Iron royalty.[77] Again, this was a direct consequence of the perceived lack of support for Mineralogy by the State. CITIC Pacific lost that case and also lost further litigation (concluded in March 2023) in which it attempted to acquire for free land held by Mineralogy for the expansion of the Sino Iron Project.[78]

(c) Even if Mineralogy had attempted to develop the projects which had received environmental approval, it is now evident that it would have failed to raise the required finance due to the Minister's 2012 decision. This is established by the evidence of [redacted] and [redacted] in the 2020 Arbitration.

81 As explained by [redacted] in his Witness Statement, in August 2020, the Claimant's Subsidiaries considered this inability to develop projects would be temporary. This was on the footing that, following the award in the 2020 Arbitration (and assuming Western Australia complied with that award and paid the damages ordered by Mr McHugh AC KC), the sovereign risk associated with the State Agreement would subside. Barring any further adverse action by Western Australia, potential funders and commercial partners would have seen that the State Agreement was enforceable and functioned as it should;

---

[76] [redacted] Statement paras 426-427.
[77] [redacted] Statement, paras 391-393.
[78] *Sino Iron Pty Ltd v Mineralogy Pty Ltd [No 15]* [2023] WASC 56 (**Exh**. **CLA-70**) and *Mineralogy Pty Ltd v Sino Iron Pty Ltd & Ors (No 16)* [2017] WASC 340 (**Exh**. **CLA-5**) and *Sino Iron Pty Ltd & Ors v Mineralogy Pty Ltd* [2019] WASCA 80 (**Exh**. **CLA-6**) and *Sino Iron Pty Ltd & Ors v Mineralogy Pty Ltd* [2020] HCATrans 10 (**Exh**. **CLA-7**).

and Mineralogy would have been in a position to recommence development of the Mining Tenements.[79]

82 It was also Mineralogy's view, as explained by [redacted], that Chinese commercial interests would re-engage once the State Agreement was again genuinely operational and the rights and obligations of the parties to the State Agreement were seen to be enforceable. China's iron ore consumption increased 8.6% between 2012 and 2022.[80] The success of the Sino Iron Project, and CITIC's desire to expand that Project, meant that China would inevitably have sought to develop further projects with Mineralogy in its own commercial interests.[81]

83 In essence, but for the enactment of the Amendment Act, the sovereign risk created by Mr Barnett's refusal to consider the BSIOP Proposal under clause 7 of the State Agreement would only have lasted for a period of some years and would cease once it had been demonstrated over time that the terms of the State Agreement could be relied upon and enforced. It was therefore reasonable to claim only for the loss associated with the period in which the sovereign risk made the development of projects untenable – a period of approximately 10 years.

84 The loss that Mineralogy intended to claim in the 2020 Arbitration for the four projects was US$31,072,000,000. This is based on a value of the BSIOP as determined by [redacted] (multiplied by four), as each future project would have essentially been a "clone" of the BSIOP and would have the same potential value.

85 It is submitted that Mr McHugh AC KC would likely have admitted the claim for the following reasons:

(a) Western Australia had not yet filed its Statement of Defence, so the new claim could be admitted by way of amendment to the Statement of Claim, without significant prejudice to Western Australia; and

(b) Some of the information in the supporting evidence (specifically the statements of [redacted] and [redacted]) was not previously available and had emerged only in the period between about January and July 2020.

[79] [redacted] Statement, para 377.
[80] Wood MacKenzie, Iron Ore Report, March 2023 (**Exh. C-459**).
[81] [redacted] Statement, paras 383-384 and 452.

86 The Claimant claims the damages that would likely have been awarded by Mr McHugh AC KC in the 2020 Arbitration in the amount of US$31,072,000,000, or such other amount as the Tribunal considers would have been awarded based on the evidence before it.[82]

(iv) *Interest*

87 In the 2020 Arbitration, the Claimant's Subsidiaries claimed interest from the date of breach (8 October 2012) until the date of Mr McHugh's award, based on the calculations of [redacted] and [redacted].[83] Post-award interest was also claimed.

88 The entitlement to interest and rate of interest to be applied in accordance with the law of Western Australia is explained in the Australian Legal Submissions at Schedule 3.[84] Pre-award interest is claimed at a simple rate of 6%, consistent with the rate awarded by the Western Australian Courts on civil judgments (*Civil Judgments Enforcement Act 2004* (WA)).[85] Post-award interest was claimed at a rate of 6%, compounded daily. An award of post-award interest on a compounding basis is expressly permitted in accordance with the *Commercial Arbitration Act 2012* (WA), the provisions of which were incorporated by reference in the 2020 Arbitration Agreement and would have been appropriate in the circumstances of this case.

89 As the Claimant seeks orders from the Tribunal that post-Award interest continue to apply in the period following the award in this arbitration, the Claimant briefly considers this Tribunal's powers to award pre- and post-award interest under international law. Pre-award interest is usually ordered in accordance with the *Chorzów Factory* principles, required to make a party whole and to compensate for the time value of money. The ability to order post-award interest was confirmed by the International Court of Justice in the *Ahmadou Sadio Diallo* case and the *Armed Activities on the Territory of the Congo* case.[86]

90 The Claimant submits that – but for the Amendment Act – Mr McHugh AC KC, a former judge who was highly familiar with the interest rates awarded in the Australian courts,

[82] See [redacted] Statement, para 453 and alternative loss of opportunity claim (below and Annexure 7C).
[83] [redacted] Affidavit (2020 Arbitration) (**Exh. C-192**); [redacted] Affidavit (2020 Arbitration) (**Exh. C-193**).
[84] See Schedule 3, from para 336.
[85] Schedule 3, para 341.
[86] *Diallo*, para. 61(5)) (**Exh. CLA-27**); *Armed Activities on the Territory of the Congo ((Democratic Republic of the Congo v. Uganda)*, Reparations, Judgment of 9 February 2022, (**Exh. CLA-33**) ("*Congo v Uganda"*), para. 409(3).

would have considered the interest requested by the Claimant's Subsidiaries in the 2020 Arbitration to be reasonable and would have ordered pre-award interest at a rate of 6% from the date of breach (8 October 2012) to the date of his award (assumed for present purposes to be 12 February 2012[87]). In order to make the Claimant whole, it is submitted that this Tribunal should order the payment of this interest.

91 [redacted] has calculated the interest on this basis, as follows:

(a) Pre-award interest on the value of the BSIOP (US$7,768,000,000) at a simple rate of 6% from 8 October 2012 to 12 February 2021 is US$3,889,533,370;

(b) Pre-award interest on the value of the BSIOP royalty (US$233,700,000) at a simple rate of 6% from 8 October 2012 to 12 February 2021 is US$117,016,471.

92 The Claimant requests that the Tribunal award the Claimant US$4,006,549,841 in pre-award interest that would have been awarded by Mr McHugh AC KC in the 2020 Arbitration.

93 In relation to post-award interest, it is submitted that Mr McHugh AC KC would have awarded interest at 6% compounded daily, as is usual in Western Australian court and arbitral practice. Post-award interest would be calculated from 14 March 2021 (being 30 days after the date on which Mr McHugh AC KC would have issued his award, in accordance with 33F(1)(b) of the *Commercial Arbitration Act 2012* (WA)).

94 It is submitted that it is appropriate for the Tribunal to apply a "post-Award" interest rate from the date on which the award in the 2020 Arbitration would have been issued. While this is an unusual position, it reflects the unusual nature of the present case. In the "but for" scenario, interest at the post-award rate would have applied from 14 March 2021. [redacted] has calculated post-award interest from this date until various dates in the future, for the Tribunal's guidance. The Claimant will update these calculations as appropriate, although the Tribunal may simply prefer to specify in its Award the rate to be applied from 14 March 2021 and the parties will undertake the required calculations at the time.

95 Should the Tribunal decline to order post-award interest from 14 March 2021, the following is claimed in the alternative:

[87] Minute of Directions, 26 June 2020 (**Exh. C-384**).

(a) Interest at the simple rate of 6% from the date of the breach (8 October 2012) until the date of this Award; and

(b) Post-Award interest from the date of this Award until payment in full at a rate of 6% compounded daily, being the rate applicable under Western Australian law or such other rate as the Tribunal considers appropriate.

(v) Costs that would have been awarded in the 2020 Arbitration

96 In the 2020 Arbitration, the Claimant's Subsidiaries claimed their legal costs and expenses, and the costs and expenses of the Arbitrator.[88] The Claimant's Subsidiaries' costs in the 2020 Arbitration were as referred to in the Statement of [redacted].[89]

97 It is likely that Mr McHugh AC KC would have awarded the Claimant's subsidiaries their costs in his award, given their success in the first two arbitrations and likely success in the 2020 Arbitration. The Claimant claims reimbursement for these costs.

Taxation

98 In order to achieve full reparation, the Tribunal should take into account the tax treatment of lump sum damages in its calculation of the Claimant's total losses.

99 Tribunals have awarded taxes provided that the claimant has been able to prove such taxes with certainty. In *Chevron v. Ecuador*, the tribunal found that a consideration of taxation was needed to make the claimants whole, provided that the taxes were certain.[90] In *Mobil v. Canada* and *Ceskoslovenska v. Slovakia*, the tribunals declined to award taxes on the basis that the claimant in each case had failed to prove the actual tax consequences of the tribunals' awards of damages.[91]

100 It is submitted that, in the present case, the Claimant has demonstrated with certainty that taxation on damages will be required and that, unless compensation is received, the

[88] Statement of Facts and Issues, para 187(p) (**Exh. C-170**).
[89] Evidence in support of these claimed fees is provided by [redacted] in his Statement.
[90] *Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador (I)* PCA Case No. 2007-02/AA277, Final Award, 31 August 2011 (**Exh. CLA-34**) ("*Chevron v Ecuador 2011")*, para 311.
[91] *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Government of Canada (I)*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and Principles of Quantum, 22 May 2012 (**Exh. CLA-55**) ("*Mobil v Canada*"), para 485 and *Ceskoslovenska Obchodni Banka, a.s. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Award, 29 December 2004 (**Exh. CLA-56**) ("*Ceskoslovenska*") at paras 360-368. See also *Rusoro Mining Limited v. The Bolivarian Republic of Venezuela,* ICSID Case No. ARB(AF)/12/5, Award (**Exh. CLA-57**) at paras 850-855.

Claimant will not be made whole. [redacted] has provided a report setting out the tax position and demonstrating the difference between the taxation position in the present case, as compared to the position had those same sums been awarded by Mr McHugh AC KC in the 2020 Arbitration.

101 The Claimant is part of a consolidated tax group in Australia under MIL (its New Zealand-based parent). The Claimant's Subsidiaries are also part of this consolidated tax group.

102 Under Australian tax law, the tax treatment of amounts paid as damages or awards for compensation may differ depending on whether the amount is deemed to be ordinary income, statutory income, a depreciating asset balancing charge or a capital gain (for tax assessment purposes). Tax treatment is primarily governed by the *Income Tax Assessment Act 1997* (Australia), together with binding taxation rulings.[92]

103 Amounts received as ordinary income or to compensate for a loss that would have been part of a taxpayer's assessable income (i.e. statutory income) will be assessable at the marginal rates of the taxpayer. This will include any amounts paid for loss of profits and interest. In essence, amounts paid as compensation will have the same character as that which it is substituted for (i.e., compensation payments which are a substitute for income are themselves income).[93] Amounts received as compensation for damage to an underlying asset will be subject to capital gains tax (**CGT**). There are, however, various exemptions, CGT discount treatment and potential CGT rollover treatment that may be relevant.

104 At paragraph 13 of his Statement, [redacted] describes the various CGT treatments that may be relevant depending on the circumstances of a particular case. [redacted] then considers whether there is any difference in the way that damages to the Claimant awarded in this arbitration would be treated for tax purposes, compared with the tax treatment of damages claimed in the 2020 Arbitration. [redacted] concludes that the only damages claim that may be treated differently for tax purposes was the $7,768,000,000 claimed for the net present value of the BSIOP that could no longer be developed or sold.

---

[92] [redacted] Statement, para 13.
[93] [redacted] Statement, para 10.

105 [redacted] states that, had Mr McHugh AC KC awarded this figure to IM in the 2020 Arbitration, it would have been treated as "recoupment of the CGT cost base of the BSIOP and its component parts", and therefore no capital gains tax (or other tax consequences) would have been incurred.[94]

106 Conversely, if the same amount is awarded by this Tribunal for breach of Australia's international obligations under the AANZFTA on the basis that the Claimant has been deprived of the value of its investment, [redacted] opines that a capital gain will arise to be assessed to consolidated tax group (with limited or no cost base). Therefore, the MIL consolidated tax groups will be liable to pay capital gains tax.

107 [redacted] considers that the Claimant will be assessed as having to pay tax of US$3,329,142,857 (being 30%), based on the total net present value of the Balmoral South Project (US$7,768,000,000).[95] Assuming four additional projects, the amount is US $16,645,714,285.

108 To ensure that the Claimant is placed in the same position as it would have been had the wrongful act not been committed, an additional amount of account for taxation is required. If the Tribunal finds that Mr McHugh AC KC would have awarded the Claimant's Subsidiaries the DCF valuation of the BSIOP (US$7,768,000,000), then the Claimant claims additional damages of US$3,329,142,857 to account for taxation. If the Tribunal finds that Mr McHugh AC KC would have awarded a different figure, the amount of taxation should be worked out using the same methodology set out in [redacted] Statement.[96]

Sovereign Risk: Compensation for other projects now rendered impossible

(i) <u>The Amendment Act caused permanent sovereign risk, meaning that the rights under the State Agreement no longer have value</u>

109 As discussed above, the sovereign risk created by the 2012 breach of the State Agreement was hoped only to last for a period of some years and, absent any further adverse action by Western Australia, would likely have subsided after some years had passed, without further incident, following Mr McHugh's award in the 2020 Arbitration. Assuming that damages were awarded and the State Agreement could be shown over a period of time

---

[94] [redacted] Statement, para 41.
[95] [redacted] Statement, para 44.
[96] [redacted] Statement, paras 44-46.

to be enforceable and working, market confidence in Mineralogy would eventually have been able to be restored. In this scenario, the "certainty" created by the State Agreement would have been reinforced by the fact that the State Agreement was upheld and that there had been no further adverse incidents thereafter.

110 The Amendment Act changed all of this. It created far reaching, irremediable, permanent sovereign risk, rendering the State Agreement effectively worthless. Mineralogy has been placed into a position where it can no longer develop the Mining Tenements it owns because the market is aware that the State Agreement cannot be relied upon. The risk of working with Mineralogy is simply too great. This was demonstrated in 2020 through [REDACTED] efforts to obtain financial backing (at that time dealing only with the temporary sovereign risk created in 2012).[97]

111 The evidence of [REDACTED] and [REDACTED] in the 2020 Arbitration showed the harm done by the Minister's original breach of the State Agreement. However, as [REDACTED] evidence explains, that damage could have been overcome by the enforcement of the State Agreement through the arbitration process. It is submitted that there can be no doubt that the damage done by the Amendment Act was far more severe, wide-reaching, irremediable, and permanent. It is now reaffirmed by [REDACTED].[98]

112 The sovereign risk created by the Amendment Act was a matter of public notoriety recognised by several legal commentators and journalists, following the enactment of the Amendment Act:

(d) The Law Society of Western Australia issued a statement noting the damage that the Amendment Act had done to the Western Australian "*State's reputation for negligible sovereign risk.*" The Law Society said this increased sovereign risk was not "*for the peace, order and good government of Western Australia*."[99]

(e) On 19 August 2020, lawyer and businesswomen Caroline Di Russo wrote:[100]

> "[The Amendment Act] is the archetypal definition of sovereign risk.
> Any unilateral change to a contract with a private party by a

---

[97] [REDACTED] Declaration, June 2020 (**Exh. C-146**).
[98] [REDACTED] Statement, paras 86-89 and p.29.
[99] Media Statement on the Iron Ore Processing (Mineralogy Pty. Ltd.) Agreement Act, The Law Society of Western Australia, 19 August 2020 (**Exh. C-129**).
[100] C Di Russo, "*Clive Palmer: the unlikely canary in the coalmine*" 19 August 2020 (**Exh. C-140**).

government on the wrong end of a commercial dispute smacks of wrangling with an African backwater despot. It might be a narrow change, but it sets a precedent: challenge this government, and if you get the upper hand, it will pull the rug out from underneath you. Given Mineralogy is the first company to challenge a state agreement, means we now have 100% strike rate of the Government moving to expropriate the rights of a private company who exercises the dispute resolution provisions prescribed in a state agreement. Regardless of the rhetoric, this will make prospective investors think twice before committing big money to projects in WA."

(f) On 22 August 2020, Tom Switzer and Robert Carling in the Sydney Morning Herald wrote:[101]

"All this should be a warning light to anyone contemplating investment in WA. Indeed, the government's action is a perfect example of sovereign risk, which drives away capital."

(g) On about 27 August 2020, Morgan Begg in The Spectator Australia wrote:[102]

"The WA government's excessively petty response is incredibly dangerous. The confirmation that the government is prepared to legislate away its liabilities presents a very real risk to any business who is considering investing in the state. This is the definition of sovereign risk."

113 Indeed, even in the High Court of Australia's Judgment on the constitutionality of the Amendment Act, Justice Edelman recognised the heightened sovereign risk caused by the Amendment Act when he said:[103]

"The decision to enact the Declaratory Provisions may reverberate with sovereign risk consequences. But those consequences are political, not legal."

[101] T Switzer and R Carling, "*The tyranny that strikes a friendless Clive Palmer could hurt any of us*" 22 August 2020 (**Exh**. **C-141**).
[102] M Begg, "*You don't need to like Clive Palmer to dislike his arbitrary treatment*" 27 August 2020 (**Exh. C-142**).
[103] *Mineralogy Pty Ltd & Anor v State of Western Australia* [2021] HCA 30, Separate Judgment of Edelman J, para 97 (**Exh**. **CLA-9**).

114 It should be recalled that the "Henry VIII clause" in section 30 allows the executive branch of the Western Australian Government to make further amendments to the State Agreement without any form of parliamentary scrutiny. While such further amendments are to be ostensibly intended to relate to the BSIOP, the wording of the clause is so broad that wide ranging amendments without parliamentary scrutiny could easily be effected at any time in the future, without any warning and with potentially wide-ranging consequences.

115 Moreover, as recognised by the commentators above, a precedent has now been set for the unilateral amendment of the State Agreement Act by way of parliamentary statute (something previously considered unthinkable). The High Court of Australia has confirmed that, under Australian domestic law, the Western Australian Parliament has the legislative capacity to make such amendments without infringing the Australian Constitution.[104] This level of risk is unacceptable to those who finance such projects and the commercial reality is that the Mining Tenements can no longer be developed.[105]

116 The evidence shows that the Amendment Act caused the sovereign risk in the State Agreement to increase to levels that prevent the Claimant and its subsidiaries from developing any further projects under the State Agreement, as [redacted] opines, and the evidence of [redacted] and [redacted] supports.

(ii) <u>Sovereign risk damage was foreseen by the Western Australian Government</u>

117 The purpose of a State agreement in reducing sovereign risk was well recognised in the market. As one commentator observed:[106]

> "A State Agreement is a highly visible signal of the State's support for and commitment to a project. This commitment effectively reduces sovereign risk, the risk of adverse decisions and actions by the State, and makes the project more attractive to key stakeholders. The effectiveness of the commitment is increased by the public nature of the document and the implications for future investment (and bond ratings) if the State unilaterally modifies the agreement."

---

[104] *Mineralogy Pty Ltd & Anor v State of Western Australia* [2021] HCA 30 (**Exh. CLA-9**), para 97.
[105] [redacted] observes at page 26 of his Expert Report, "because of the Act, the prospects for new projects to be financed are zero."
[106] R. Hillman, The Future Role for State Agreements in Western Australia (2006) 25 ARELJ 293 at 295 (**Exh. CLA-36**).

118 The Western Australian Government had endorsed this position on multiple occasions. In the period between at least 2009 and 2020, a document published by the State acknowledged:[107]

> "Since 1952 State Agreements have been regularly used by successive Western Australian Governments to foster resource development such as mineral, petroleum, or wood extraction, and related downstream processing projects, together with essential related infrastructure investments.
>
> Such developments often require long term certainty, extensive or complex land tenure and are located in relatively remote areas of the State. Ratification of the Agreement through an Act, and the fact that State Agreement provisions can only substantially be changed by mutual consent, provide certainty with regards to the project itself, security of tenure and reduction of sovereign risk."

119 Mr Barnett published an article in 1996 entitled "*State Agreements*" acknowledged the key role that certainty played within State agreements. He said:[108]

> *"Whereas other statutes are able to be changed at will, the provisions of State Agreements are only able to be changed by mutual agreement in writing between the parties to each State Agreement. State Agreements therefore provide certainty that ground rules for the life of each agreement project cannot be changed unilaterally…*
>
> *Unlike other statutes of Western Australia that can be changed by Parliament, State Agreement provisions can only be amended by mutual agreement by the parties thereto…"*

120 The impact the Amendment Act would have on sovereign risk was also recognised during the (short) parliamentary debate on the Amendment Act. Dr Nahan said:[109]

> "The basis of our democracy is the rule of law and access to the rule of law for all citizens in all activities, even if they are people of low

[107] Department of State Development, "State Agreements" found at Indexed bundle of documents referred to in the Applicant's Statement of Issues Facts and Contentions, p.7826 (**Exh. C-196**).
[108] Hon. Colin Barnett, "*State Agreements*" AMPLA Yearbook 1996, pp. 317 and 321 (**Exh. C-104**).
[109] Legislative Assembly Hansard, 12-13 August 2020, p.4812, (**Exh. C-429**).

standing. If this action is taken unilaterally, it will create significant sovereign risk. As the Leader of the Nationals WA said, just because the Attorney General said the bill will not cause sovereign risk, does not mean it is true. It is not true. As other members have said, the foundation for our wealth in the mining sector is the strength of our agreement acts, the rule of law and the generally bipartisan approach to the implementation and formation of contracts and the property rights that spring from them. This is the fundamental issue to our economy."

121 It is evident that Western Australia was aware of the sovereign risk it was creating when it enacted the Amendment Act but chose to pursue that course regardless. There can be no doubt that Western Australia must have anticipated the impact that the Amendment Act would have on the ability of the Claimant and its subsidiaries to develop future projects under the State Agreement.

(iii) The projects that would have been developed but for the Amendment Act

122 The term of the State Agreement is 60 years. In the first 10 years four projects were to be developed by Mineralogy. These were (i) the Sino Iron Project; (ii) the Korean Steel Project; (iii) the BSIOP, and (iv) the additional project set out in the first Migliucci statement in the 2020 Arbitration.

123 As discussed above, when the Minister refused to consider the BSIOP Proposal in 2012, Mineralogy already had filed the PER document for a further three projects.[110] These projects were to be completed by 2017 as shown in the timeline on page (ii) of the Public Environmental Review.[111] This shows the rate of development that Mineralogy was achieving. There is no reason to presume that the rate would have slowed down. As described in the paragraphs above, the iron market has continued its strong growth.

124 Magnetite ore produces lower emissions in the steel making process and is naturally closer to steel than any other form of iron ore. It is therefore in high demand, and an attractive proposition for those wishing to reduce their carbon emissions in line with global environmental commitments. This would likely have made magnetite ore even more sought after in the future.[112]

[110] Public Environmental Review, October 2009 (**Exh. C-143**).
[111] Public Environmental Review, October 2009 (**Exh. C-143**).
[112] [redacted] Statement, para 385.

125 Conservatively, the Claimant estimates that through its subsidiaries, it would have continued to develop (at least) four projects every 10 years for the remainder of the term of the State Agreement, had the Amendment Act not intervened. As the State Agreement has a further 40 years to run (to 2062), this equates to 16 further projects that would have been developed over this period. At 24mtpa per project, this was more than feasible in the current market.

126 It is recalled that last year (2022), Australia exported 692 million tonnes of iron ore to China alone. Even if all 16 future projects were up and running, this would result in the Claimant exporting 384 million tonnes of iron ore concentrate per year. Given predictions of increasing demand for iron ore well into the future, there is no question that the ore produced through these 16 further projects would have been sold. With the State Agreement functioning as it should, all 16 projects were feasible and likely to have been developed.

127 The Claimant confirms that the iron ore deposits its subsidiaries hold through the Mining Tenements are more than capable of fulfilling 16 further projects.

128 Hellman & Schofield Pty Ltd confirmed the extent of the deposit available under the Mining Tenements in 2004 saying:[113]

> "This analysis, based on limited data, indicates that potentially between 60 and 160 billion tonnes of magnetite BIF mineralisation occurs on the Mineralogy leases in the region of the Fortescue River mouth. This total potential mineralisation is situated in 2 areas – Balmoral and Bilanoo. The potential mineralisation at Balmoral is likely to be between 20 and 40 billion tonnes, while the Bilanoo lease is likely to contain between 40 to 80 billion tonnes. The average grade of the BIF is to be around 32% Total Fe and 23% MagFe at Balmoral and around 1% lower than this at Bilanoo."

129 This equates to around 50 billion tonnes of magnetite contrate.[114]

(iv) Quantum

[113] Hellman & Schofield Pty Ltd Report, 10 November 2004, p.8 (**Exh. C-145**).
[114] ██████ Statement, para 380.

130 Valuing the loss suffered by the Claimant's inability to develop future projects is assisted by the fact that these projects were intended to be copies or clones of the BSIOP.[115] Moreover, the Sino Iron Project is currently functioning under the royalty model, meaning that there is a present example upon which the value of future projects (if done under the royalty model) would adopt. The Sino Iron Project was used by Mr Migliucci in the 2020 Arbitration when valuing the First Option.

131 As Sergey Ripinsky and Kevin Williams noted in *Damages in International Investment Law*:[116]

> "Valuation can be performed on the basis of past transactions with the evaluated asset itself. Such transactions, whether executed or only contemplated by the parties at arm's length, represent strong evidence of the asset's [fair market value], provided that no value-affecting factors have interfered between the date of the transaction and the valuation date."

132 [redacted] has undertaken a further valuation review in his expert report.

133 Conservatively, the Claimant adopts [redacted] valuation of the BSIOP as an appropriate proxy for the value of future projects. If all 16 projects had been developed, this represents a loss of US$124,288,000,000.

Alternative basis for Awarding loss – Lost Opportunity

134 Should the Tribunal consider that the quantum claimed for: (i) the termination of the 2020 Arbitration Agreement (and the 2020 Arbitration being conducted pursuant to it) or (ii) sovereign risk implications of the Amendment Act, is too speculative or uncertain, the Claimant claims in the alternative loss on the basis of "loss of a commercial opportunity".

135 A loss of opportunity (or chance) claim is appropriate where elements of the damages analysis are uncertain. Uncertainty may be viewed as a matter of speculation and lead to no recovery at all – however, this should not be the case where the possibility of profits itself has a value. At the very least, it is submitted that the Claimant has lost the chance

---

[115] [redacted] Statement, para 419.

[116] Sergey Ripinsky and Kevin Williams, *Damages in International Investment Law* (2008), p. 216, quoted in *Khan Resources v Mongolia*, para 410 **(Exh. CLA-26)**. See also *Bilcon* at para 289 (**Exh. CLA-24**).

or opportunity in the present case for its subsidiaries to pursue damages in the 2020 Arbitration and to develop further projects under the State Agreement. This opportunity has very significant value.

136 The case In *Sapphire International Petroleums Ltd. v National Iranian Oil Company* involved the cancellation of rights to explore for oil. Being satisfied that there was a sufficient probability that oil would be discovered, compensation was appropriate. The tribunal held that:[117]

> "It is not necessary to prove the exact damage in order to award damages. On the contrary, when such proof is impossible, particularly as a result of the behaviour of the author of the damage, it is enough for the judge to be able to admit with sufficient probability the existence and extent of the damage."

137 Loss of opportunity was also used by the tribunal in *Bilcon v Canada* to assess damages, where the tribunal found that the investor had lost the opportunity to have the environmental impact of its project assessed in a fair and non-arbitrary manner. The tribunal assessed the loss of opportunity based on the prospect that a return on investment might have been generated if approval had been granted.[118]

138 In *Gemplus v Mexico*, the tribunal noted that where income-based approaches to quantum are inappropriate in view of the uncertainty of future income streams, the prospect of future earnings must not be disregarded entirely. Such prospects inform the value of the opportunity that a claimant has lost.[119]

139 The UNIDROIT Principles (2010) also support the recovery of this form of compensation in Art 7.4.3(2), which contemplates compensation for "loss of chance" based on the probability that an event would occur.

140 In relation to the 2020 Arbitration, the Claimant's Subsidiaries lost the opportunity to pursue damages through the arbitral process when the 2020 Arbitration Agreement (and the 2020 Arbitration being conducted pursuant to it) was wrongfully terminated by the

---

[117] *Sapphire International Petroleums Ltd. v National Iranian Oil Company*, Ad hoc Arbitration, Award, 15 March 1963 (**Exh. CLA-37**) ("*Sapphire*"), para 15.
[118] *Bilcon*, paras 302-303 (**Exh. CLA-24**).
[119] *Gemplus S.A., SLP S.A., and Gemplus Industrial S.A. de C.V. v. The United Mexican States* (ICSID Cases No. ARB(AF)/04/3), Award, 16 June 2010 (**Exh. CLA-38**) ("*Gemplus*"), paras. 13-70.

Amendment Act. This is similar to the position in *Chevron v Ecuador* where the tribunal observed that the claimants' primary loss was the chance for a judgment by the Ecuadorian courts. The tribunal said that it "must ask itself how a competent, fair, and impartial Ecuadorian court would have resolved [Chevron]'s claims. The Tribunal must step into the shoes and mindset of an Ecuadorian judge and come to a conclusion about what the proper outcome of the cases should have been …"[120]

141 The Tribunal therefore has the power to determine the appropriate damages due to the Claimant for the breach of the State Agreement, based on the evidence before it. Even if the Tribunal is unable to establish with sufficient clarity the damages that would have been awarded by Mr McHugh AC KC in the 2020 Arbitration, the Tribunal may substitute its own quantification of damages based on the Claimant's lost chance to pursue the 2020 Arbitration.

142 In relation to sovereign risk, the Claimant submits that it has lost the opportunity to develop projects in the future due to the substantial sovereign risk now associated with the State Agreement. Should the Tribunal determine that it is too speculative to award compensation for the full 16 projects that the Claimant claims would have been developed (or indeed for 20 projects if the four projects claimed in the 2020 Arbitration are included), the Tribunal is entitled to consider instead the opportunity that the Claimant has lost to develop those projects and determine compensation based on "the odds" that the Claimant (through Mineralogy) would have been able to develop those projects (or at least some of them).

143 For this purpose, the Claimant has developed tables that allow the Tribunal to consider "the odds" or risk as to whether all projects would have been developed. These tables are set out in [redacted] Statement dated 22 March 2023 at paragraph 453.

144 By way of example only, the Tribunal may consider that there is a 50% chance that all 16 projects would have been developed had the Amendment Act not intervened and destroyed the certainty created by the State Agreement, then according to the table the appropriate damages would be US$62,144,000,000.

145 Percentages between 20-100% have been provided for the Tribunal's convenience.

[120] *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador (I)*, PCA Case No. 2007-02/AA277, Award on the Merits, 30 March 2010 (**Exh. CLA-35**) ("*Chevron v Ecuador 2010*"), para 375.

Moral damages

146 In addition to the compensation for loss and damage caused by the sovereign risk arising from the Amendment Act, as claimed above, the Claimant claims compensation for moral damages resulting from the significant harm done to its reputation by the Amendment Act, made worse by the humiliation, harassment and hurt suffered by its local subsidiaries, officers and local staff.

147 The Claimant's reputation and those of its related persons and entities (including its directors, its subsidiaries and the directors, officers and employees of its subsidiaries) have been left in tatters by the Amendment Act and the vitriol directed towards key personnel associated with the Claimant and its subsidiaries. This has caused great distress to the company and its key personnel. The behaviour of the Western Australian Government was, it submitted, deliberately designed to cause this distress and harm to the company. It is submitted that the Claimant is entitled to moral damages to compensate it for this non-pecuniary damage to its reputation and prestige, as well as the significant anxiety and stress endured by key personnel due to Western Australia's vilification of the Claimant and its officers, particularly the Claimant's director Mr Palmer.

148 Awarding moral damages have a long pedigree in international law. Under the full reparation principle, the Respondent must compensate the Claimant for moral damages it has suffered. Article 31(2) of the ILC's Articles on State Responsibility provides that the full reparation standard requires compensation for "any damage, whether material or moral, caused by the internationally wrongful act of the State" (emphasis added).

149 In its Commentary to the Articles on State Responsibility, the ILC provides the following illustration of the type of moral damages affecting an individual that can be compensated:

> "non-material damage is generally understood to encompass loss of loved ones, pain and suffering as well as the affront to sensibilities associated with an intrusion on the person, home or private life."[121]

150 Professor Stephan Wittich provided a more comprehensive definition in his paper on moral damages in international law (which he refers to as "non-material damages"):[122]

---

[121] ILC Articles' Commentary at 101 (**Exh. CLA-10**).
[122] Stephan Wittich, Non-Material Damage and Monetary Reparation in International Law, 15 Finnish Y.B. Int'l L. 329, (2004) quoted in P Dumberry "Compensation for Moral Damages in Investor-State Arbitration Disputes" 27(3) (2010) Journal of International Arbitration 247 at 249 (**Exh. CLA-40**).

> "First, it includes personal injury that does not produce loss of income or generate financial expenses. Secondly, it comprises various forms of emotional harm, such as indignity, humiliation, shame, defamation, injury to reputation and feelings, but also harm resulting from the loss of loved ones and, on a more general basis, from the loss of enjoyment of life. A third category would embrace what would be called non-material damage of a "pathological" character, such as mental stress, anguish, anxiety, pain, suffering, stress, nervous strain, fright, fear, threat or shock. Finally, nonmaterial damage would also cover minor consequences of a wrongful act, e.g., the affront associated with the mere fact or a breach or, as it is sometimes called, "legal injury."

151 As Umpire Parker confirmed in the Lusitania cases: [123]

> "[s]uch damages are very real, and the mere fact that they are difficult to measure or estimate by money standards makes them none the less real and affords no reason why the injured person should not be compensated therefor as compensatory damages."

152 In 2008, the *Desert Line v. Yemen* tribunal for the first time awarded moral damages in an investment treaty arbitration. The tribunal confirmed that "it is generally accepted in most legal systems that moral damages may also be recovered (…) [and that] there is no reason to exclude them."[124]

153 In that case, Desert Line alleged that its personnel had been imprisoned for four days, harassed by the Yemeni military, and threatened and assaulted with artillery by tribal militants. Desert Line claimed that it was entitled to moral damages because: (1) Desert Line's executives suffered stress and anxiety from being intimidated, harassed, threatened, and wrongfully detained; and (2) Desert Line's business credit, reputation, and prestige had been tarnished.[125] The tribunal agreed that compensation for moral damage was appropriate and awarded Desert Line USD 1 million for moral damage.

---

[123] *Opinion in the Lusitania Cases (Mixed Claims Commission United States/Germany)*, Volume VII of the November 1, 1923 to 1930, Reports of International Arbitral Awards prepared by the UN, at 40 (**Exh. CLA-41**).
[124] *Desert Line Projects LLC v. Republic of Yemen* ("*Desert Line*"), ICSID Case No. ARB/5/17, Award, 6 February 2008 (**Exh. CLA-42**) ("*Desert Line*"), para 289.
[125] *Desert Line* (**Exh. CLA-42**), paras 33-34, 166, 256.

154 In both the *Desert Line* case and *Von Pezold v Zimbabwe*, the tribunal recognised that moral damages were available to corporate claimants (legal persons) for loss of reputation, credit and prestige, as well as for the suffering of the corporation's executives and personnel.[126] This pragmatic approach to moral damages has been recognised by legal commentators.[127]

155 While moral damages are usually awarded only in exceptional cases,[128] it is submitted that the present case is truly exceptional. The Claimant and its subsidiaries were targeted seemingly as a result of personal animosity by Western Australia towards one of its directors. The gravity and intensity of the sustained attacks on the Claimant, its local subsidiaries, and its directors, officers and employees went far beyond what might be considered normal or reasonable conduct, such that an investor should have the requisite "mental fortitude" to bear it.[129]

156 The circumstances upon which the moral damages claim is based are set out in **Annexure K1** to the Notice of Intent, which is incorporated by reference into the Arbitration Notice. In brief, these circumstances include the damage inflicted on the Claimant and the Claimant's Subsidiaries in the commercial world by the Amendment Act and the contribution such damages have made to the ability of the Claimant and its subsidiaries to commercially operate to their optimum commercial potential by the repeated attack on the Claimants director inter alia as follows:

(a) Mr McGowan made statements conveying the imputation that Mr Palmer "*represents a threat to the people of Western Australia/Australia and is dangerous to them*"[130] calling him an "*enemy of the State*" which Mr McGowan acknowledged was associated with espionage and warfare.[131]

---

[126] *Desert Line*, paras 286-289 (**Exh. CLA-42**); *Von Pezold v Zimbabwe* ICSID Case No. ARB/10/15, Award, 28 July 2015, (**Exh. CLA-43**) ("*Von Pezold v Zimbabwe*"), paras 911-913, 915-916 and 923. See also *Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013 (**Exh. CLA-44**) ("*Arif v Moldova*"), para 584; *Oxus Gold v. The Republic of Uzbekistan*, ad hoc (UNCITRAL), Final Award, 17 December 2015 (**Exh. CLA-45**), para. 895.

[127] See Patrick Dumberry "Compensation for Moral Damages in Investor-State Arbitration Disputes" (2010) 27 J Int'l Arb 247 (**Exh. CLA-40**); B Sabahi, *Compensation and Restitution in Investor-State Arbitration* (OUP, 2011) (**Exh. CLA-51**).

[128] *Von Pezold v Zimbabwe* (**Exh. CLA-43**), para 909; *Lemire v Ukraine* (**Exh. CLA-25**), para 333.

[129] See *Arif v Moldova*, para 605 (**Exh. CLA-44**).

[130] **Annexure K1**, Notice of Intent, para 116 (**Exh. C-63**).

[131] Transcript of hearing in the defamation case between Mr Palmer and Mr McGowan, 9 March 2022, p.381 (**Exh. C-466**).

(b) Amongst the many statements made by Mr McGowan regarding Mr Palmer, a few examples are set out below (with further examples contained in **Annexure K1** to the Notice of Intent):

i "a menace to Australia" who was "playing with people's lives";[132]

ii "the biggest loser";[133]

iii "Australia's greatest egomaniac", "an Olympic scale narcissist" and an "ego centrist of the highest order";[134]

iv "absolutely obscene", a person who is "trying to take our money" and "trying…to bankrupt Western Australia";[135] and

v "he's really quite a piece of work" whose "whole strategy" involves "costing people their lives."[136]

157 While Mr McGowan singled out Mr Palmer for these attacks, they were also attacks on the Claimant and its subsidiaries which stemmed from Mr McGowan's resentment about their previous successes in the domestic arbitrations and the resultant damages claim being made in the 2020 Arbitration. The reputational damage to the Claimant (and all associated with it) from these sustained and malicious attacks was immense. The constant vitriol had created such prejudice against the Claimant and its subsidiaries that the Amendment Act was passed effectively without question. That, no doubt, was the very purpose of the campaign of vitriol and abuse.

158 The damage caused to the reputation of the Claimant's Subsidiaries affected innocent employees of those entities.

159 The statements made in the press following the Amendment Act's enactment – again based on comments by the Western Australian State[137] – are further evidence of the severe reputational damage perpetrated deliberately against the Claimant, its subsidiaries and their respective officers and employees. These articles included depictions of Mr

---

[132] Press conference, 26 July 2020 (**Exh. C-131**).
[133] Television appearance, 28 July 2020 (**Exh. C-131**).
[134] Press conference, 2 August 2020 (**Exh. C-131**).
[135] Transcript of Press conference, 12 August 2020, (**Exh. C-465**).; Facebook post, 12 August 2020, Palmer Statement (**Exh. C-134**).
[136] Press conference, 4 September 2020 (**Exh. C-468**).
[137] The close relationship between the press and Mr McGowan can be seen at paragraphs 127-132 of Annexure K1 of the Notice of Intent.

Palmer as Dr Evil, a cane toad, a cockroach, a chicken, and vermin being repelled by Mr McGowan's "pest spray".[138] The huge reputational damage and indignity resulting from this has severely impacted the credit and prestige of the Claimant and its subsidiaries. The stress and anxiety caused to its personnel cannot be underestimated. This was a deliberate and calculated campaign by the State to turn the Claimant and its associated entities into 'public enemy no.1' and to forever damage its credibility, such that future business development has become impossible.

160 The campaign has not been limited to words. Baseless charges have been brought, and maintained, against Mr Palmer regarding alleged fraud between sibling companies of which he is a director, and which carries a substantial jail term. In relation to the first set of charges (brought in February 2020 and maintained since) in the Supreme Court of Queensland, Justice Callaghan queried the rationale for the charges, which appeared to him to be unusual in circumstances where no harm had been suffered and where Mr Palmer appeared to be being singled out for "special treatment", with Justice Callaghan AC KC saying that:[139]

> "It conjures a number of questions, including those that fairly might be asked about:
>
> (a) The appropriateness of pursuing a criminal prosecution in the circumstances described in Annexure A and D;
>
> (b) The feasibility and appropriateness of doing so when no one has suffered a financial detriment, and the "advantage" said to have been obtained was one that was enjoyed by one entity, which must have been accrued as the expense of another such entity, in circumstances where each of those entities is under the control of the one identity;
>
> (c) The implications for commercial activity if prosecutions were pursued in all such cases; and
>
> (d) Whether, if such matters are not conveniently the subject of prosecution, the plaintiff is being singled out for special treatment."

---

[138] See cover pages of the *West Australian* newspaper, July and August 2020 (**Exh. C-54**).

[139] Supreme Court of Queensland with Supreme Court Number 6350 of 2021, para 57 (**Exh. CLA-46**) (emphasis added).

161 A written opinion of [redacted] (referred to in the criminal proceedings) confirms that the charges are baseless.[140]

162 Further charges against Mr Palmer are being maintained by the Australian Securities and Investment Commission in respect of a failure to make a bid for a company. These charges have been made contrary to Justice Greenwood's orders of the Federal Court of Australia in *Coeur De Lion Investments Pty Ltd v The Presidents' Club Limited*,[141] where his Honour confirmed that all offers were validly made and all requirements regarding the bid were completed, making orders, expressly declared to be "in rem" to that effect. Corporate lawyer and [redacted] has opined that the charges are improper.[142]

163 Again, the stress and anxiety created by having to defend these serious, but baseless, charges is considerable. The misuse of the judicial system to pressurise the Claimant, its subsidiaries and their respective officers and employees, and to damage their reputation, is deplorable. It has caused non-pecuniary harm, well beyond that which can be easily quantified in the damages claims made for sovereign risk. The Claimant submits that it is entitled to moral damages to compensate for this harm.

164 Quantification of moral damages is challenging. Reza Mohashami QC has suggested that tribunals should be encouraged to look "to the jurisprudence of human rights tribunals for guidance on how intangible harms have been quantified" and that equity may have a role to play in quantifying damages.[143] The Tribunal may find *Castillo-Paez v. Peru*, a decision of the Inter-American Court of Human Rights, instructive.[144] In that case, the Court recognised that moral damages are difficult, if not impossible, to quantify. As a result, the Court suggested a "prudent assessment" of moral damages, with no absolute rule possible. The ICJ also supports this approach, stating: "In the view of the Court, non-material injury can be established even without specific evidence."[145]

165 The present case bears similarity to *Trinh Vinh Binh v Vietnam* where the claimant was awarded US$10 million in moral damages for, amongst other things, improper

---

[140] Opinion of [redacted] (**Exh. C-5**).
[141] *Coeur De Lion Investments Pty Ltd v The Presidents' Club Limited* (No 2) [2020] FCA 1705 (**Exh. CLA-47**).
[142] [redacted] Opinion (**Exh. C-6**).
[143] R Mohtashami KC et al. "Non-Compensatory Damages in Civil and Common Law Jurisdictions: Requirements and Underlying Principles" In J Trenor (ed), *The Guide to Damages in International Arbitration* (4th ed), Global Arbitration Review (2020), at p.43 (**Exh. CLA-48**).
[144] *Castillo-Paez v. Peru* (IACHR) (Reparation and Costs), 27 November 1998 (**Exh. CLA-49**).
[145] *Diallo*, p. 334 (**Exh. CLA-27**).

imprisonment following baseless charges and allegations, the hurt suffered following the stripping of assets, taking of assets.[146]

166 In the present case the Claimant has been subjected to the stripping of assets on a discriminatory and arbitrary basis, personal attacks on the integrity and character of its executives and personnel, baseless (but serious) criminal charges.

167 Based on the conduct above, the Claimant claims moral damages of US$10,000,000,000, or such other amount as the Tribunal considers appropriate.

[146] The Award in this case has not been made public, but the issues are discussed in Global Arbitration Review, "Dutch national wins moral damages against Vietnam", 15 April 2019 (**Exh. CLA-52**).